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No. 71-1627

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, GULF DEPARTMENT DISTRICT BOARD OF ADJUSTMENT OF BRAC, FULTON LODGE NO. 2040, MESSRS. W. A. JOHNSON AND PAUL J. MASSON, *Petitioners,*

v.

REA EXPRESS, INC., *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The petitioners, the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees (BRAC), the Gulf District Board of Adjustment of BRAC, Fulton Lodge No. 2040 of BRAC, Mr. W. A. Johnson, General Chairman of the Gulf Department District Board of Adjustment of BRAC, and Mr. Paul J. Masson, Field Representative of BRAC, respectfully pray that a writ of cer-

tiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this case on May 1, 1972.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit, issued May 1, 1972, not yet reported, appears in Appendix "A" hereto. The opinion and order of the United States District Court for the Northern District of Georgia was entered on May 17, 1971, and is not yet reported. It appears in Appendix "B" hereto.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on May 1, 1972. This petition for certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. In the absence of any legal standards established by this Court for determining whether a dispute subject to the Railway Labor Act is a "major" dispute or a "minor" dispute, should a carrier be permitted to make unilateral wholesale changes in rates of pay, rules, and working conditions embodied in collective bargaining agreements without compliance with Section 6 of the Act, upon the basis of a finding accepting the carrier's contention that the agreements "arguably" permitted it to do so, particularly where different and more restrictive standards have been applied by other Courts of Appeals?

2. Where a District Court has found that the plain language of agreements relied upon by the carrier does not permit the unilateral making of wholesale changes

in rates of pay, rules, and working conditions embodied in the agreements involved, without compliance with the requirements of Section 6 of the Railway Labor Act, does Rule 52(a) of the Federal Rules of Civil Procedure permit a Court of Appeals to hold that the dispute is a "minor" dispute, subject only to Section 3, without finding that the District Court's findings of fact are clearly erroneous?

3. Where a carrier has unilaterally instituted wholesale changes in rates of pay, rules, and working conditions embodied in collective bargaining agreements without compliance with the requirements of Section 6 of the Railway Labor Act, may a Court of Appeals permit such changes to be made without prior arbitration of the substance of the changes when the contract provision upon which the carrier relies provides for such arbitration, the District Court has found that the plain language of the provision covering arbitration does not permit changes prior to arbitration, and the Court of Appeals makes no finding either that the District Court's finding is clearly erroneous or that the carrier can "arguably" apply the arbitration provision in such fashion?

4. May a District Court under the decision of this Court in *Detroit & Toledo Shore Line R. Co.* v. *United Transportation Union,* 396 U.S. 142, permit a carrier to unilaterally make changes in rates of pay, rules, and working conditions embodied in collective bargaining agreements when there is pending at the time of such changes a Section 6 notice giving rise to a "major" dispute with respect to the contract provision upon which the carrier relies?

5. May a District Court properly refuse to issue a status quo order pending arbitration in a case where

the carrier has made wholesale changes in rates of pay, rules, and working conditions embodied in collective bargaining agreements merely upon a finding that a "minor" dispute is involved because the carrier's contention that the contract permits such procedure is "arguable"?

STATUTORY PROVISIONS INVOLVED

This case primarily involves the interpretation and application of Sections 2, Seventh, and 6 of the Railway Labor Act (45 U.S.C.A., Sections 152, Seventh, and 156). Section 2, Seventh, of the statute reads as follows:

> "No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title."

Section 6 of the statute reads as follows:

> "Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted

upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board."

Section 3, First (i) of the statute reads as follows:

"The disputes between an employee or group of employees and a carrier or carriers growing out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

STATEMENT OF THE CASE

This litigation concerns a dispute between BRAC and REA Express (REA) growing out of the carrier's action in unilaterally changing rates of pay, rules and working conditions of its employees represented by BRAC embodied in collective bargaining agreements between the two parties.

REA is a carrier engaged in the express transportation of property by railroad, truck and air. It is subject to the provisions of the Interstate Commerce Act (49 U.S.C.A., Sections 1, et seq.) and of the Railway Labor Act (45 U.S.C.A., Sections 151, et seq.). BRAC is the duly designated representative under the Railway Labor Act of all of the employees of REA, with minor exceptions At the time the dispute here

involved arose, these employees numbered approximately 19,000 (R. 480-481).

The employees of REA represented by BRAC are divided into three categories. These are (1) the office and related employees of REA at its principal office in New York City and its various subsidiary offices throughout the United States, who perform work generally designated as clerical and office work; (2) platform employees at various REA Express terminals who are principally engaged in the occupation of loading and unloading REA express shipments; (3) drivers of REA express trucks. This latter group is further broken down into categories of (a) local drivers who engage in pick-up and delivery service for REA express shipments and transporting of such shipments to and from REA Express terminals (including air terminals) in intra-city transportation, and (b) drivers engaged in inter-city over-the-road trucking operations. It is the rates of pay, rules, and working conditions of this last category of employees that are here involved (R. 480).

In accordance with the requirements of Section 2, First, of the Railway Labor Act (45 U.S.C.A., Section 152, First), BRAC has negotiated a basic collective bargaining agreement with REA governing the rates of pay, rules, and working conditions of the express employees represented by BRAC which has been amended from time to time. The latest such agreement became effective January 1, 1967 (R. 318). This agreement was amended in certain respects by the agreement of December 14, 1968 (R. 319). The basic collective bargaining agreement contains the usual provisions to be found in collective bargaining agreements under the Railway Labor Act. The agreement

also contains memoranda of understanding on the application of certain designated rules therein.

Rule 16, covering changes in the agreement, provides that the agreement "shall continue in effect until changed as provided in the Railway Labor Act, as amended."

In addition to the basic collective bargaining agreement, BRAC has negotiated individual agreements with REA covering rates of pay, some rules, and working conditions of employees engaged in OTR truck runs. In excess of 700 of such agreements have been negotiated (District Court Transcript, 229).

Rule 2 of the basic agreement established seniority for employees based upon seniority districts of defined limit with seniority rosters for each district. Under Rule 3 the promotion, assignment, and displacement of employees is based primarily upon seniority. Where OTR runs operated between cities within a single seniority district employees on the driver seniority roster for that district bid for and are assigned to the available jobs on the basis of their seniority. Where the OTR runs operate through or into more than one seniority district, a driver on the seniority roster of each seniority district bids for and is assigned to the operation in that district. In some cases of OTR runs operating in more than one seniority district, the assignments are split between drivers from each district by agreement between BRAC and REA.

On November 6, 1970, REA advised BRAC by letter that it wished to discuss a program for OTR truck service in the northeast area providing "for the establishment of new routes and revisions in existing routes". On November 18, 1970, REA furnished BRAC with a list of 17 specific items covering the

proposed REA program. All of these items, except two, dealt with revisions in existing runs rather than the creation of new runs. Between November 18, 1970, and April 19, 1971, the matter was the subject of substantial correspondence and several meetings between representatives of BRAC and REA. At no time did REA submit to BRAC a complete proposal covering rates of pay, rules, and working conditions of the employees involved. Beginning on January 26, 1971, REA began to announce to BRAC an intention to unilaterally put the changes into effect without agreement. BRAC advised REA that to do so would constitute a violation of the Railway Labor Act. On March 9, 1971, REA posted notices to carry out its threat. When BRAC threatened to strike, REA withdrew the notices (R. 480-514).

During this period REA made clear to BRAC that its so-called program for the northeast routes was merely a prelude to a nationwide program covering all truck routes throughout the United States. Therefore, the consequences of the carrier's intended actions were not limited to the specific routes involved but would have a nationwide impact upon a substantial number of employees.

Therefore, on April 1, 1971, BRAC, in accordance with the moratorium provisions of the basic agreement, served a Section 6 notice upon REA for revisions in rates of pay, rules, and working conditions in that agreement, which included cancellation of the so-called memorandum on the application of Rule 8. However, REA refused to negotiate with BRAC with respect thereto (R. 508-511).

REA also refused to negotiate concerning its wholesale changes in rates of pay, rules, and working condi-

tions in the agreements covering the truck routes involved and instead on April 19, 1971, unilaterally put these changes into effect.

In summary, REA unilaterally imposed the following changes in existing collective bargaining agreements with BRAC covering 16 OTR runs in the northeast section:

(a) It reduced the compensation paid drivers for all 16 runs;

(b) In 14 of the runs REA, in direct violation of the seniority provisions of the basic agreement, and without negotiating a change therein as required by the Railway Labor Act, took away existing seniority rights to runs and gave such rights to employees not entitled thereto;

(c) In the case of 11 runs, the working conditions of employees were affected by a change of domicile of the driver;

(d) The unilaterally imposed changes included changes in working conditions of employees embodied in agreements covering such other matters as layovers, mileage driven, and hours, meals.

In the case of the 17th run, a new run between Newark and Youngstown, the carrier unilaterally imposed its own rates of pay, rules, and working conditions, without negotiating such matters as required by the Railway Labor Act.

Faced with this wholesale resort by the carrier to self-help, BRAC took similar action and began the first nationwide strike which it had conducted against REA in nearly 40 years of representing the carrier's employees.

BRAC, in an effort to peacefully settle the matter through mediation, invoked the services of the National Mediation Board. These efforts were unsuccessful because REA during the course of such mediation proceeded to file suit to enjoin BRAC. Although the runs involved were entirely located in the northeast section of the United States, the carrier's complaint was filed in the United States District Court for the Northern District of Georgia at Atlanta.

The REA complaint was based upon the allegation that the dispute was a "minor" dispute within the meaning of the Railway Labor Act, which was required to be settled in accordance with the provisions of Section 3 thereof. REA contended that its actions were authorized by Section 2, Seventh of the Railway Labor Act (45 U.S.C.A., Section 152, Seventh) because they were done in the manner permitted by the collective bargaining agreements with BRAC. Specifically, REA contended that it was authorized to unilaterally change rates of pay, rules, and working conditions by Rule 8 of the collective bargaining agreement and the Memorandum of Understanding between the parties interpreting such rule. Rule 8 read as follows:

> "Rule 8—Over-the-Road Truck Service
>
> "By agreement with the General Chairmen in the Districts in which over-the-road truck runs are operated, the provisions of Rules 4, 5, 6 and 9 may be suspended and special provisions will be established governing hours of service, overtime, and basis of pay of over-the-road truck runs."

The Memorandum of Understanding on the application of Rule 8 read in pertinent part as follows:

> "It is agreed and understood that under the application of Rule 8 existing over-the-road truck

runs will continue to operate in accordance with Article IX of the September 1, 1949 Agreement. Arrangements concerning operation of new runs will be worked out by agreement between the General Chairmen and the Company representatives except that:

(a) Commencing January 1, 1967 overtime will begin to accrue at the time and one-half basis after one hundred and seventy (170) hours; and

(b) Layover time shall be counted as service time after the start of the fifteenth (15th) hour.

"In the event of failure to make an agreement concerning the operation of a new run within forty-five (45) days after notice is given to the General Chairman or General Chairmen representing the employes to be affected, the matter may be referred by either party to final and binding resolution in accordance with Sections 3 and/or 7 of the Railway Labor Act, as amended. The issues submitted for such determination shall not include any question as to the right of the Company to establish the run but shall be confined to the manner of implementing the run."

REA did not rely upon Rule 12, an essential ingredient of the Court of Appeals decision, in either its complaint to the District Court or in its arguments to that court.

The District Court originally granted an ex parte restraining order but then attempted to solve the problems by Court-directed discussions between the parties. However, REA did not give up its claim to unilaterally make the changes so the case proceeded.

BRAC filed an answer to the complaint along with a counterclaim. The counterclaim alleged that the actions of REA were in violation of Section 2, First, Section 2, Seventh, Section 6 and Section 8 of the Railway Labor Act (45 U.S.C.A., Sections 152, First and Seventh, Sections 156 and 158).

The District Court conducted a full evidentiary hearing and on May 17, 1971, entered its memorandum opinion and order finding that REA had changed rates of pay, rules, and working conditions embodied in collective bargaining agreements in violation of the requirements of the Railway Labor Act (R. 573-589). The District Court found that the changes which the carrier had unilaterally made involved changes in rates of pay, rules, and working conditions embodied in agreements. The District Court also found that the plain language of the agreements did not authorize the unilateral action taken by the carrier. The District Court therefore ordered as follows (R. 588):

> "It is therefore ORDERED: (1) That the plaintiff be, and it is hereby, ENJOINED from implementing or instituting the changes proposed in its notice letter of April 13, 1971; and that (2) with respect to said proposed changes, plaintiff restore the status quo as it existed prior to April 19, 1971. (3) The defendant having already served notices of and requests for mediation pursuant to § 6 of the Railway Labor Act, it is ORDERED that it be, and it hereby is, likewise ENJOINED from continuing the strike called by it against plaintiff on April 19, 1971 until such time as the full procedures called for by the RLA have been complied with."

The District Court stayed its order pending appeal.[1]

The Court of Appeals decision (Circuit Judge Ainsworth dissenting) reversed the District Court and held that the dispute was a "minor" dispute within the meaning of Section 3 of the Railway Labor Act, ordered arbitration, and denied BRAC a status quo order.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS CONCERNING THE STANDARD TO BE APPLIED IN DETERMINING WHETHER A DISPUTE ARISING OUT OF UNILATERAL CHANGES OF RATES OF PAY, RULES, AND WORKING CONDITIONS EMBODIED IN AGREEMENTS IS A "MAJOR" OR "MINOR" DISPUTE WITHIN THE MEANING OF THE RAILWAY LABOR ACT

One of the important, if not the most important, principle established by the Railway Labor Act for the regulation of labor relations of airlines and railroads subject to the Railway Labor Act is the distinction between "major" and "minor" disputes. This Court in its decision in *Elgin, J. & E. R. Co.* v. *Burley*, 325 U.S. 711 (1944), set forth the two classes of controversy and the differences in the handling of each

---

[1] On May 10, 1971, REA filed with the District Court a motion for an amendment to its complaint to include (a) a prayer for compensatory and punitive damages against BRAC and (b) an order from the District Court to defendants to arbitrate their dispute with REA. On June 29, 1971, the District Court entered its order providing that the amendment be filed subject to an appropriate motion by defendants to dismiss. Insofar as the amendment requested an order to compel arbitration, the District Court noted that such request was no different from the one made by REA in the original complaint upon which the Court had ruled adversely on May 17, 1971 (R. 590, 591).

type of controversy under the Railway Labor Act as follows (page 723):

> "The first relates to disputes over the formation of collective agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy. They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past.
>
> "The second class, however, contemplates the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one. The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case. In the latter event the claim is founded on some incident of the employment relation, or asserted one, independent of those covered by the collective agreement, e. g., claims on account of personal injuries. In either case the claim is to rights accrued, not merely to have new ones created for the future.
>
> "In general the difference is between what are regarded traditionally as the major and the minor disputes of the railway labor world."

A "major" dispute must be settled through the procedures of a Section 6 notice, negotiations, mediation, and a Presidential Emergency Board if appropriate. A "minor" dispute must be settled by resort to the adjustment board procedures of the statute. *BRAC* v. *Florida East Coast Ry.*, 384 U.S. 238; *Andrews* v. *Louisville & Nashville R. Co., et al.*, — U.S. —, 80 LRRM 2240.

Thus, a determination as to whether a given dispute is a "major" or "minor" dispute has a substantial

impact upon the parties and upon the application of the Railway Labor Act to their dispute. It is a recurring problem as evidenced by the voluminous volume of cases dealing with the subject and its consequences. It is a particularly acute problem where, as in the present case, a carrier unilaterally has instituted changes in rates of pay, rules, and working conditions embodied in collective bargaining agreements and asserts a right to do so under the provisions of Section 2, Seventh, of the Railway Labor Act on a claim that the agreement authorizes the unilateral changes.

In spite of the significance of this problem and its impact upon the application of the Railway Labor Act to the parties subject thereto, this Court has never established a legal standard for determining whether a dispute is a "major" dispute or a "minor" dispute. The general statement set forth by this Court in the *E. J. & E.* case, quoted above, is of no assistance at all to the courts or to the parties in determining whether a "major" or a "minor" dispute exists in cases like the present. In the present case, the carrier has unilaterally changed the terms and conditions of existing collective bargaining agreements and has created rights for the future. Under the general language of the *E. J. & E.* case the dispute should clearly be a "major" dispute subject to negotiation, mediation, Emergency Board procedures if justified. Yet, the decision below holds that the dispute is a "minor" one. Nor have the subsequent decisions of this Court laid down a clear legal standard for dealing with the problem. Rather, these decisions have dealt with the required procedures to be followed in the case of a particular class of dispute. *Brotherhood of Railway and Steamship Clerks* v. *Florida East Coast Ry.*, 384 U.S. 238; *Brotherhood of Railroad Trainmen* v. *Chicago River*

& I. R. Co., 353 U.S. 30; *Union Pacific Co.* v. *Price,* 360 U.S. 601; *Pennsylvania R. Co.* v. *Day,* 360 U.S. 548; *Andrews* v. *Louisville and Nashville R. Co., et al.,* — U.S. —, 80 LRRM 2240 (decided May 15, 1972).

The absence of any clear legal standard for determining the character of a dispute under the Railway Labor Act has created a situation in which the Courts of Appeals, as set forth below, have not followed any uniform standard and to the contrary have applied conflicting standards.

This significant and recurring problem of the standards to be applied should be resolved by this Court, particularly in light of different standards applied by Courts of Appeal.

2. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS AS TO THE PROPER LEGAL STANDARD TO BE APPLIED IN DETERMINING WHETHER A "MAJOR" OR "MINOR" DISPUTE EXISTS UNDER THE RAILWAY LABOR ACT

In the present case, the Court of Appeals applied the standard of whether the contention of the carrier was "arguable" and on this basis found that a "minor" dispute existed, although the carrier was unilaterally imposing wholesale changes in rates of pay, rules, and working conditions embodied in collective bargaining agreements and in spite of the fact that the District Court had found that the language of the agreements was plain and unambiguous against the carrier's contention. The standard thus applied by the Court of Appeals is contrary to the legal standard applied by other Courts of Appeals in determining the character of a dispute.

Thus, the Second Circuit in *Rutland Ry. Corp.* v. *Brotherhood of Locomotive Engineers,* 307 F.Supp.

21 (1962) *cert. den.* 372 U.S. 954, applied the following standard (page 34):

> "It is a minor dispute if there is a clearly governing provision in the present agreements, although its precise requirements are ambiguous; and it is also minor if what the railroad seeks to do is supported by customary and ordinary interpretation of the language of the agreements."

Under these standards, the present dispute is clearly a "major" dispute because there is no clearly governing contract provision and there is a history of making the changes involved by negotiation and not by unilateral carrier action.

In *Southern Railway Co.* v. *Brotherhood of Locomotive Firemen and Enginemen,* 127 U.S.App.D.C. 371, 384 F.2d 323 (1967), the Court of Appeals for the District of Columbia Circuit laid down the following standard for determining the character of the dispute (page 327):

> "If the railroad took action which it admitted was not in conformity with the existing agreement there would be no question that a 'major' dispute was involved; and the same result necessarily obtains where the railroad's claimed justification is without any reasonable basis in the contract."

Upon the application of this standard of "reasonable basis," the present dispute is a "major" dispute. The carrier has clearly unilaterally changed the terms of existing agreements and as found by the District Court there is no reasonable basis in the contract for its actions, nor does the Court of Appeals find that there is a reasonable basis.

In *Order of Railway Conductors and Brakemen* v. *Spokane, P. & S. Ry. Co.,* 366 F.2d 99 (1966), *cert.*

den. 385 U.S. 1025, the Court of Appeals for the Ninth Circuit established a standard of a "reasonable interpretation of facts" (page 106). Again, under such a standard the present dispute would be characterized as a "major" dispute.

Numerous other decisions of Courts of Appeals under the Railway Labor Act simply do not establish any standard at all. They simply define a "minor" dispute as one involving the interpretation and application of a collective bargaining agreement and a "major" dispute as one involving changes in such an agreement. See, for example, *Brotherhood of Locomotive Firemen and Enginemen* v. *Elgin, J. & E. Ry. Co.,* 404 F.2d 80 (7th Cir., 1968); *Itasca Lodge of BRAC* v. *Railway Express,* 391 F.2d 657 (8th Cir., 1968). In the *Itasca Lodge* case the Eighth Circuit stated (page 665) that the problem involved a fine line and a question of degree. This is tantamount to no standard at all and leaves the matter to the predilections of particular courts and particular judges.

The statutory scheme should not be subjected to the vague and inconsistent standards which thus far have been applied in determining the character of disputes arising under the Railway Labor Act.

3. THE STANDARD APPLIED BY THE COURT BELOW IS DESTRUCTIVE OF THE STATUTORY SCHEME

It is clear from the myriad of cases in the Federal courts interpreting and applying the Railway Labor Act that the statute intended to set up an orderly scheme for changes in rates of pay, rules, and working conditions embodied in collective bargaining agreements through Section 6 notices, negotiations between the parties, mediation under the auspices of the Na-

tional Mediation Board, Emergency Board reports and recommendations if justified, and/or voluntary arbitration. This statutory scheme is junked in the present case on the basis that the carrier presents an arguable position that its wholesale changes in rates of pay, rules, and working conditions embodied in existing agreements can be made without a Section 6 notice, without negotiation, and without mediation because done in the manner prescribed in the collective bargaining agreement. Nothing could be more calculated to provide an escape hatch from the requirements of the Railway Labor Act. The District Court clearly recognized this when it found that what the carrier was doing destroyed the statutory scheme provided by the Railway Labor Act. The District Court statement (R. 587-588), quoted with approval by dissenting Circuit Judge Ainsworth, reads as follows:

> "In short, what plaintiff proposes is to do away with the procedures prescribed by the RLA by substitution. If such action were allowed the whole scheme of the Act would be set at naught and all the evils which it seeks to eliminate revisited upon the parties and the public. As the Supreme Court has said in a somewhat similar context:
>
> > " 'The processes of bargaining and mediation called for by the Act would indeed become a sham if a carrier could unilaterally achieve what the Act requires be done by the other orderly procedures.' *Brotherhood of Railway, Airline and Steamship Clerks* v. *Florida East Coast R.R.*, 384 U.S. 238, 247."

Yet, the standard applied by the Court of Appeals is that the carrier may produce this kind of result if its contention is found to be "arguable". By this the

Court of Appeals means that the contention is not "fictitious" or "merely colorable". *St. Louis-S.F. & T. Ry. Co.* v. *Railroad Yardmasters of America,* 338 F.2d 749 (5th Cir., 1964), *cert. den.* 377 U.S. 980, quoted with approval, *Brotherhood of Locomotive Firemen, Etc.* v. *Southern Pacific Co.,* 447 F.2d 1127 (5th Cir., 1971). This standard leaves only a minimum burden on a carrier attempting to justify its unilateral action in making wholesale changes in rates of pay, rules, and working conditions which the statute intended to be accomplished only through negotiation and mediation. The District Court and Circuit Judge Ainsworth are entirely right that this is the road to the emasculation of the statutory scheme.

4. THE DECISION OF THE COURT OF APPEALS IS CLEARLY ERRONEOUS AND IN VIOLATION OF THE FEDERAL RULES OF CIVIL PROCEDURE

The District Court found that the memorandum on Rule 8, cited by the carrier in support of its unilateral action, did not in plain language authorize such action. The court found that it "plainly distinguishes between *new* runs and *existing* runs and treats each differently, separately, and in the disjunctive". The court pointed out that the portion relied upon by the carrier by its express language relates only to new runs and was not applicable to changes in existing runs such as were here involved. The District Court further pointed out that even if it were assumed *arguendo* that the carrier's position had substance, it could not unilaterally impose the changes involved prior to the arbitration provided therein. Finally, the District Court found that the carrier's position violated the Railway Labor Act in various other respects.

Under Rule 52(a) of the Federal Rules of Civil Procedure, the findings of fact of the District Court

cannot be set aside "unless clearly erroneous" and due regard is to be given to the opportunity of the trial court to judge the credibility of witnesses. The rule does not permit a Court of Appeals to decide a matter de nova and substitute its own judgment. *Zenith Radio Corp.* v. *Hazeltine Research Inc.,* 395 U.S. 100. The Court of Appeals decision completely ignores the requirements of Rule 52(a) (indeed, it does not even mention the Rule) and makes no finding that the District Court's findings of fact are clearly erroneous. Instead, the decision reaches a contrary result by importing into the agreement a class of runs characterized as "restructured" when no such language appears therein. In substance, therefore, the decision requires the employees and their representative to accept sweeping unilateral changes in rates of pay, rules, and working conditions embodied in their agreements on nothing more than the say-so of the carrier.

The Court of Appeals compounds its inequity and error of its decision by its handling of the problem of the unilateral changes in seniority rights made by the carrier. It was obvious that these changes could not be made under Rule 8 no matter how that rule was interpreted. The Court of Appeals therefore in order to uphold the carrier was required to conclude that there was an arguable issue about the application of Rule 12 of the agreement although the carrier had never relied upon Rule 12 during its discussions with BRAC, did not mention Rule 12 in the evidentiary hearing before the District Court, and there was no testimony with respect to that Rule and its application. Thus the Court of Appeals gratuitously made erroneous findings with respect to a contract issue, which was necessary to its decision, without a shred

of evidence before it on that issue. The petitioners do not comprehend how such action can be squared with the requirements of Rule 52(a).

5. THE COURT OF APPEALS VIOLATED THE RAILWAY LABOR ACT IN NOT REQUIRING MAINTENANCE OF THE STATUS QUO

A. The Decision Below Illegally Authorizes the Carrier To Unilaterally Change Rates of Pay, Rules, and Working Conditions Prior to Arbitration of Those Changes Without a Finding That the Contract Involved "Arguably" Permits the Carrier To Do So.

The decision below should have upon the basis of its own findings ordered a status quo. The District Court found, *inter alia,* that even if Rule 8 and the memorandum applying Rule 8 were applicable to the changes made, the carrier could not unilaterally make these changes thereunder without first having arbitrated the substance of the changes. The Court of Appeals made no finding that the findings of the District Court on this point were in error, much less that they were clearly erroneous, nor did the Court of Appeals find that the last sentence of the memorandum of application of Rule 8 cited by the carrier even "arguably" gave it the right to proceed unilaterally *prior* to arbitration. Nevertheless, in footnote 3 on page 13 of its decision the Court of Appeals states that, since the dispute is a "minor" one on the basis of its findings that Rule 8 and Rule 12 "arguably" apply to the changes made, REA was entitled to proceed. The Court cites for this conclusion its decision in *Board*[2] *of Locomotive Firemen, Etc.* v. *Southern Pacific Company,* 447 F.2d 1127, in which the Fifth Circuit stated that there is no general provision in the Railway

[2] This is a misprint in the Court of Appeals decision. The proper word is "Brotherhood".

Labor Act preventing a party from acting unilaterally upon its interpretation of a contract pending exhaustion of the grievance procedures. The application of such a principle in a case such as the present one involving wholesale changes in rates of pay, rules, and working conditions constitutes a complete destruction of the purposes of the statute. This is particularly true when the Court of Appeals does not make and is unable to make a finding that the position of the carrier with respect to the contract provision involved was even "arguably" correct. What the Court of Appeals here has done is to adopt the position of the carrier that it may unilaterally place into effect changes of rates of pay, rules, and working conditions embodied in collective bagaining agreements solely on its assertion that it has a right to do so under the agreement. If this is so, then the Railway Labor Act is completely destroyed.

The Court should have at the very minimum ordered the maintenance of the status quo pending the abitration which it finds to be required with respect to the substance of the changes.

B. The Decision Below Violates the Status Quo Requirements of Section 6 of the Railway Labor Act

There was pending at the time the carrier unilaterally instituted its changes in the rates of pay, rules, and working conditions a Section 6 notice creating a bargaining situation with respect to the scope of Rule 8 and the memorandum applying Rule 8. The decision of this Court in *Detroit & Toledo Shore Line R. Co.* v. *United Transportation Union,* 396 U.S. 152 (1969) requires a maintenance of the status quo pending a resolution of the Section 6 notice.

C. The Decision Below Is Arbitrary in Not Granting a Status Quo Order as a Condition of Its Order To Arbitrate

If the status quo problem is examined solely from the point of view of preserving the status quo pending a resolution of a Section 3 dispute, the Court of Appeals action in refusing to issue a status quo order is arbitrary under the decision of this Court in *Brotherhood of Locomotive Engineers* v. *M-K-T R. Co.*, 363 U.S. 528. The Court of Appeals based its refusal of such a status quo order on the action of the District Court in staying its own status quo order pending appeal. The portion of the Court of Appeals decision dealing with the status quo order (pages 13 and 14) makes no reference to the fact that the action of the District Court was predicated in important part upon a recommendation to the parties that they proceed with all haste to reach agreement, an objective which was completely frustrated by REA.

Finally, it is submitted that upon an issue of this nature where the best that the Court of Appeals can find for the carrier's position is that it is arguable and where the action which the carrier is taking clearly involves unilateral changes in rates of pay, rules, and working conditions, a status quo order should issue. BRAC is not aware of any case in which any carrier has been permitted to make such wholesale changes without first resolving the substance of such changes through the applicable procedures of the Railway Labor Act.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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June, 1972

APPENDIX

APPENDIX

APPENDIX "A"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-2212

REA EXPRESS, INC., *Plaintiff-Appellant,*

versus

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, ET AL., *Defendants-Appellees.*

Appeal from the United States District Court for the Northern District of Georgia

(May 1, 1972)

Before BELL, AINSWORTH and GODBOLD, *Circuit Judges.*

GODBOLD, *Circuit Judge:* This action involves a labor dispute between Railway Express, Inc. (REA), an express carrier governed by the Railway Labor Act, 45 U.S.C. §§ 151, *et seq.*, and its operating personnel represented by the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees (BRAC). The dispute concerned proposed changes by REA in its trucking operations. During the course of their controversy the parties reached a seeming impasse, and REA unilaterally instituted the proposed changes in its own favor. In response BRAC called a strike. REA filed suit in federal district court seeking an injunction against the strike. BRAC counterclaimed requesting a status quo order.

The question of the strike's validity turns upon the determination of whether the underlying dispute is "major" —in which case the strike is permissible—or "minor"—in which circumstance BRAC cannot strike but must proceed with REA to arbitration before the National Railroad

Adjustment Board. After a full evidentiary hearing and in an unpublished opinion the District Court held the dispute to be major. We reverse.

For many years REA has engaged in hauling freight. Initially its activities were carried on exclusively by rail, but in more recent years rail operations have become impractical and uneconomical. REA has, therefore, shifted more and more of its freight operations from rail to over-the-road (OTR) truck runs.

At present the parties are governed by a collective bargaining agreement effective since January 1, 1967. In apparent recognition of changing times, the contract to some extent undertook to provide for a smooth transition from rail operations to OTR runs. Rule 8 of the agreement provides:

> By agreement with the General Chairmen in the Districts in which over-the-road truck runs are operated, the provisions of Rules 4, 5, 6 and 9 may be suspended and special provisions will be established governing hours of service, overtime, and basis of pay of over-the-road truck runs.

In an attempt to explain more thoroughly the meaning and force of Rule 8, the parties also agreed to the following "Memorandum of Understanding" as to the application of the rule:

> It is agreed and understood that under the application of Rule 8 existing over-the-road truck runs will continue to operate in accordance with Article IX of the September 1, 1949 Agreement. Arrangements concerning operation of new runs will be worked out by agreement between the General Chairmen and Company representatives except that: * * * *
>
> In the event of failure to make an agreement concerning the operation of a new run within forty-five

> (45) days after notice is given to the General Chairman or General Chairmen representing the employees to be affected, the matter may be referred by either party to final and binding resolution in accordance with Sections 3 and/or 7 of the Railway Labor Act, as amended. The issues submitted for such determination shall not include any question as to the right of the Company to establish the run but shall be confined to the manner of implementing the run.

Prior to the dispute which gave rise to this litigation, REA and BRAC had been able to agree upon all changes in working conditions necessary to implement a substantial number of OTR runs. At first "slip-seat" runs were instituted; that is, with respect to a run between terminals such as Philadelphia and Boston a truck would leave each terminal traveling toward the other. The two trucks would meet at a prearranged point approximately midway between the two terminals, exchange trailers, and return to their home bases.

The drivers were paid a fixed amount per round trip. For several reasons slip-seating was inefficient. In the words of the District Court,

> If one driver broke down or was unable to make the switching point on time, the other driver had to waste time awaiting his arrival. The time involved in switching operations was also lost, and REA found that, at least in some instances, the fixed "trip rate" agreed upon did not permit them to always get a full eight hours' work for the equivalent of eight hours' pay.

As a consequence of such shortcomings, REA and BRAC began renegotiating the operation of the OTR runs. The restructuring usually involved the elimination of the slip-seat arrangement and provided for a through run by one truck. Necessarily changes had to be made in layover procedures, hours of service, and rates of pay. All such

matters were agreed upon on a run-by-run basis. During the existence of the 1967 contract, some 700 runs were restructured in this fashion. At the same time rail operations were continuing to dwindle, and OTR runs were substituted for inefficient rail routes. Changes in working conditions which arose on account of the substitution of an OTR run for a rail route were again worked out on an ad hoc basis for each run.

In the fall of 1970, REA proposed to substitute an OTR run for an existing rail run in the northeastern United States and to restructure 16 existing truck runs in the same geographical region. With respect to this proposal, the parties were unable to reach an accord on rates of pay, layovers, and changes in seniority and domicile rights. After lengthy negotiations and on April 13, 1971, REA served notice that it intended unilaterally to institute the proposed changes. The union denied the existence of such power and contended that since the proposals affected rates of pay and working conditions a major dispute was involved within the meaning of the Railway Labor Act. Accordingly, said the union, the changes could be made only by mediation pursuant to section 6 of the Act or by agreement. The union therefore served section 6 notices seeking to invoke the jurisdiction of the National Railroad Mediation Board. REA countered, stating that the dispute was minor, and refused to submit to mediation.

On April 19, 1971, as the date approached on which implementation was to occur, BRAC called a strike. Two days later REA filed its complaint in the United States District Court for the Northern District of Georgia. That court issued a temporary restraining order enjoining the strike, compelling the parties to negotiate further, and allowing REA to implement the disputed changes at its own risk pending a full hearing. REA did implement the changes.

Several weeks later, after a full evidentiary hearing, the District Court determined that the dispute was indeed

major, and accordingly held that the union was automatically entitled to a status quo order, that is, an injunction forbidding REA's continued implementation of the runs. But rather than restoring the status quo at that point, the court stayed its order pending appeal. The court announced the following rationale:

> Though not called upon to do so, the court, after hearing the evidence in this case, expresses the opinion: (1) that, in the long run, the making of the changes proposed by the plaintiff here (as distinguished from the manner in which they were proposed and made) is probably in the best interest of both parties; and (2) that the defendant union probably has no serious objection to them per se, provided only that the manner of their implementation can be agreed upon. In view of these opinions the court has ordered restoration of the status quo most reluctantly and only because it felt compelled to do so. The court therefore recommends to the parties that, if they agree with these conclusions, they proceed with all haste to attempt to reach an agreement. It has also occurred to the court that the conclusions reached in this order may be found to be wrong. If so, much damage may have accrued and many backward steps may have been taken. The court also believes that, pending an appeal, if any, the danger of irreparable injury to plaintiff is greater than to defendant. If the position of defendant is affirmed it can always exact restitution in the end. In view of these considerations, and in order to give the parties time to consider the suggestions made by the court, it is therefore ORDERED that execution of this order be stayed for a period of ten days or until a ruling on any appeal herein, should one be filed.

The question before this court is whether the District Court erred in its determination that the dispute is major.

Several consequences flow from that finding. First, with respect to a major dispute, the Act provides that after failure to negotiate an agreement the parties may voluntarily submit the dispute to the National Railroad Mediation Board. 45 U.S.C. §§ 155, 156. If either party refuses, the Mediation Board is without power to decide the dispute or to force the parties to arbitrate, and they are free to resort to self help. *Id., Elgin, Joliet & Eastern Ry. Co.* v. *Burley,* 325 U.S. 711, 89 L.Ed. 1886 (1945). Finally, upon request by one of the parties, the federal court is required to issue a status quo order. 45 U.S.C. § 156; *Detroit & Toledo Shore Line R.R. Co.* v. *United Transportation Union,* 396 U.S. 142 (1969). On the other hand, if the dispute is minor the Act provides that upon failure to arrive at a negotiated settlement either party may request that the jurisdiction of the Adjustment Board be invoked. *Elgin, supra.* In such case the nonrequesting party must submit to arbitration, *Id.;* there is no right of self help. *Id.* And the federal court has discretion either to issue or to refuse to issue a status quo order. *See Detroit & Toledo Shore Line, supra; BRAC* v. *REA,* 391 F.2d 657, 8th Cir. (1968); *Switchmen's Union* v. *Central of Georgia Ry. Co.,* 341 F.2d 213 (5th Cir.), *cert. denied,* 382 U.S. 841 (1965).

Major disputes arise over changes in rates of pay, rules and working conditions where the method of change is not provided in the existing labor contract. *E.g., Elgin, supra.* Minor disputes are those regarding the application or interpretation of existing collective bargaining contracts. *E.g., St. Louis, S. F. & T. R. Co.* v. *Railroad Yardmasters,* 328 F.2d 749 (5th Cir.), *cert. denied,* 377 U.S. 980 (1964); *Rutland Ry. Corp.* v. *Brotherhood of Locomotive Eng.,* 307 F.2d 21 (2d Cir. 1962), *cert. denied,* 372 U.S. 954 (1963).

In this case REA proposed implementation of 17 OTR runs. The parties could not agree on the manner and method of implementation, and upon BRAC's refusal to arbitrate REA unilaterally implemented the runs. As a consequence of such action, various changes in pay basis,

hours of service, layovers, domicile, and seniority rights obtained. REA's position is that Rule 8 and its accompanying Memorandum of Understanding make provision for such changes and that accordingly any dispute arising out of the proposed runs is minor. BRAC's view is that by the terms of the Memorandum Rule 8 applies only to changes resulting from implementation of "new runs," and of the 17 runs in issue only one is "new" while the other 16 constitute restructured existing runs. Moreover, BRAC says that even if all 17 of the runs are "new" within the meaning of the Memorandum there is no method prescribed therein for settling disputes over changes in seniority rights, domicile, layovers, and the specific compensation paid drivers as distinguished from the basis thereof.

The District Court accepted BRAC's characterization that neither Rule 8 nor the Memorandum governs restructured OTR runs and found that of the 17 proposed runs 16 were restructured and that as far as those 16 were concerned a major dispute was involved. Put shortly, we cannot agree that 16 of the 17 proposed runs definitely fall without the ambit of Rule 8 and its accompanying Memorandum. In *United Industrial Workers* v. *Board of Trustees*, 352 F.2d 183, 188 (5th Cir. 1965), Chief Judge Brown aptly stated the test for determining whether a particular dispute is major or minor:

> At the outset several things may be briefly emphasized. The first is, of course, that if by its terms of reasonable implication therefrom, the collective agreement apparently affords some arguable basis for the action, the interpretation of the contract, the question of who is right—Carrier or Union—is for determination by the Railroad Adjustment Board, a Court having jurisdiction only to mold equitable relief to preserve the status quo pending Adjustment Board decision.

(footnotes omitted).

The key word in this test is "arguable". If the court finds an arguable basis it must defer to the expertise of the Adjustment Board. The District Court denied the existence of such a basis, holding, as noted above, that the plain meaning of the Memorandum distinguishes between "new" as opposed to "existing" runs. In our view it is clear that there is no such plain meaning. The first sentence of the Memorandum states:

> It is agreed and understood that under the application of Rule 8 existing over-the-road truck runs will continue to operate in accordance with Article IX of the September 1, 1949 Agreement.

That sentence could mean that no changes in working conditions on runs in existence on the effective date of the contract can be made without negotiation of a new contract unless the runs themselves are restructured, in which case they become "new runs" governed by the special provisions of Rule 8 and of the Memorandum. We in no way intimate that the above interpretation is correct, but merely note that it is arguably so. It may be that the correct construction is that of the District Court, or the possible construction noted above, or one different from either. The true meaning of the Rule and of the Memorandum is the grist of arbitration.

Having found that there is an arguable basis for invoking Rule 8 and its provision for suspending the terms of Rules 4, 5, 6 and 9, we find that any dispute over hours of service (Rule 4), basis of pay (Rule 9), holidays (Rule 6), and overtime (Rule 5) arising out of implementation of the 17 proposed runs is minor.

BRAC falls back to the position that even if Rule 8 is applicable it does not contemplate changes in seniority, domicile, layovers, and specific compensation as distinguished from a basis thereof. The District Court did not reach this issue. We again point out that controversy over

such changes constitutes a minor dispute if provisions for settling such a dispute are arguably contained within the collective bargaining agreement. Rule 8 establishes the method by which changes in rates of pay, overtime and hours of service are to be made when such are called for in connection with implementation of a new OTR run. With respect to the dispute over compensation, we hold that changing from a "trip rate" to an "hourly rate" is arguably a change in basis of pay within the scope of Rule 8. In regard to changes in seniority and domicile, Rule 12[1] (Transfers and Consolidations) arguably applies. That rule provides a method (similar to that in Rule 8) for settling seniority disputes arising out of the transfer of "positions . . . from one seniority district to another . . . ."[2]

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[1] Rule 12(a) provides in full:

> "(a) This Agreement recognizes that two or more offices or departments may be consolidated and/or positions or work involving a position may be transferred from one seniority district to another after conference and agreement between the Management and the duly accredited representatives of the employees. In the event of failure to make an agreement within (60) days after notice is given to the General Chairman or General Chairmen representing the employees to be affected by the contemplated change, the matter may be referred by either party to final and binding resolution in accordance with Section 3 and/or 7 of the Railway Labor Act as amended. The issues submitted for such determination shall not include any question as to the right of the Company to make the change but shall be confined to the manner of implementing the contemplated change."

In addition subsections (b) through (e) of the Rule contemplate and provide for changes in domicile by employees who move in order to protect their seniority rights.

[2] That Rule 12 arguably governs any change in seniority rights caused by implementation of the 17 runs here at issue is best shown by example. Prior to REA's proposal there was an OTR run between Philadelphia and Pittsburgh with slip-seating occurring at Breezewood, Pennsylvania, the boundary line between the Philadelphia and Pittsburgh seniority districts. Thus under

Moreover, the Memorandum of Understanding as to the applicability of Rule 8 states that the procedure for establishing "[a]rrangements concerning operation of new runs" is set out therein. Arguably the word "arrangements" includes seniority, domicile, layovers, and compensation. Therefore, any dispute over such arrangements is minor.

In sum, all changes which result from implementation of the 17 runs are arguably governed by Rule 8, by its accompanying Memorandum, or by Rule 12. Accordingly, the entire dispute is minor.[3]

REA asks that this court issue an arbitration order. The parties, by their action leading up to this litigation, have made it clear that there is no possibility of a negotiatied

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the old run a driver with seniority in Philadelphia handled the leg from Philadelphia to Breezewood while another driver with seniority in Pittsburgh drove the other leg. Under the REA proposal, all drivers would be based in Pittsburgh. Arguably, the "position" (within the meaning of Rule 12) of the driver from Philadelphia to Breezewood has been transferred to the Pittsburgh seniority district. Pursuant to Rule 12, then, all the drivers formerly based in Philadelphia would have the right to transfer to Pittsburgh and to maintain their seniority rights. Accordingly, any seniority dispute over implementation of the Philadelphia-Pittsburgh run is minor. The same logic applies to the other runs.

[3] The District Court, after finding that the dispute was major, reasoned further that "even if this [finding] * * * is wrong [REA] nevertheless cannot prevail on its contention that the agreement (memorandum) authorizes what it has unilaterally done." This statement by the trial judge does not relate to the question of whether the dispute is major or minor but rather to the issue of REA's power to implement the new runs upon BRAC's refusal to arbitrate even assuming BRAC was required to arbitrate. Having found that the entire dispute is minor, in that all of the changes incumbent on implementation of the proposed runs are arguably governed by contract provisions, we find authority for REA's action in Board of Locomotive Firemen v. Southern Pacific Co., 447 F.2d 1127 (5th Cir. 1971), and in St. Louis, S.F. & T. Ry. Co. v. Railroad Yardmasters, 328 F.2d 749 (5th Cir.), *cert. denied*, 377 U.S. 980 (1964).

settlement. Since the dispute is minor, REA has the right to institute compulsory arbitration. To ensure that arbitration is had forthwith we direct the court below to vacate its finding that the dispute is major and to issue an order to arbitrate. The District Court was careful to point out that a status quo order rescinding REA's unilateral implementation of the 17 proposed runs might cause far greater irreparable harm to REA than to BRAC. We agree. Having found the dispute to be minor, issuance of a status quo order becomes discretionary. *See Detroit & Toledo Shore Line, supra; BRAC* v. *REA, supra; Switchmen's Union* v. *Central of Georgia Ry. Co., supra.* Therefore, on the basis of the reasons set out by the District Court in support of its stay of its own status quo order pending this appeal, we direct that the entire status quo order be vacated.[4]

REVERSED and REMANDED with directions.

AINSWORTH, Circuit Judge, dissenting:

The principal issue here is whether the labor dispute between the parties is a major or minor dispute. I differ with the majority and agree with the District Court (Judge Edenfield) that the present case involves a major dispute. I, therefore, would affirm the District Court for the reasons pointed out in Judge Edenfield's well-reasoned, written opinion, which reads in pertinent part as follows:

As in many of these cases, all parties concede that a determination of the single question whether the dispute here

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[4] The Detroit & Toledo Shore Line case in no way forbids our denial of status quo. That case, as Judge Ainsworth has noted in United Transportation Union v. Georgia Railroad, — F.2d — (No. 71-1925, 5th Cir., Dec. 14, 1971) (slip op. at 6), mandates "that the status quo be maintained between labor and management, the union and the railroad here, while a 'major dispute' between the parties is being resolved in accordance with the terms of the [Railway Labor] Act." In this case we have found a 'minor dispute," and accordingly we are free to refuse status quo order.

is a "major" dispute on the one hand or a "minor" dispute on the other will be largely determinative. A major dispute, of course, includes disputes over rates of pay, rules, working conditions to be included in new contracts, or changes to be made in existing contracts. The Railway Labor Act also provides (45 U.S.C. § 152 (Seventh)) with respect to major disputes, that "no carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in Section 156 of this title." Section 156 in turn provides that the provisions in the agreement regarding rates of pay, rules, and working conditions shall not be altered until the controversy has finally been acted upon by the Mediation Board.

Minor disputes on the other hand are those regarding the mere interpretation or application of existing collective bargaining agreements. Where a minor dispute is involved, compulsory arbitration before the National Railway Adjustment Board is required. For a general discussion of the difference between major and minor disputes, *see Elgin, Joliet & Eastern Ry.* v. *Burley,* 324 U.S. 711. *See also St. Louis, S. F. & T. Ry.* v. *Railroad Yardmasters of America,* 328 F.2d 749 (5th Cir. 1964), where Judge Tuttle discussed a minor dispute as one in which the respective contentions of the parties are based on existing agreements regarding rights that have already accrued.

The court finds, and indeed all parties virtually agree, that the changes which the carrier proposed to unilaterally implement in this case, standing alone, would clearly involve a major dispute[2] and that, nothing else appearing, the carrier could not put them into effect until there had been either an agreement with the union or the controversy had been finally acted on by the Mediation Board. 45 U.S.C.

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[2] It is beyond question under the evidence that these changes directly altered rates of pay, working conditions, and seniority districts of the drivers involved.

§ 156, *supra*. Of course this court realizes that not every issue between the carrier and the union relating to "rates of pay, rules or working conditions" requires that § 6 be invoked. It must be invoked, however, where a unilateral change with respect to these matters, not provided for by contract, is proposed. *See St. Louis, S. F. & T. Ry., supra* at 753.

The plaintiff carrier, however, seeks to avoid the conclusion that a major dispute is involved on the ground that the changes it proposed were either expressly authorized, or at least arguably authorized, under the existing contract between the parties, and that the provisions of the agreement together with the last clause of § 2, Seventh, of the Railway Labor Act (45 U.S.C. § 152, Seventh), *supra*, permit it to unilaterally make the proposed changes irrespective of what kind of dispute might otherwise be involved. It also asserts that the dispute in any event can only be a minor one since it only involves an interpretation of the bargaining agreement.[3]

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[3] REA vigorously relies on the recent case of Northwest Airlines, Inc. v. Airline Pilots Ass'n., Intl., No. 20667, 8th Cir., Apr. 15, 1971 (slip opinion). As REA contends, this case does indicate that if a dispute between a carrier and a union arguably arises out of an interpretation of the collective bargaining agreement, the dispute should be submitted to arbitration. In *Northwest* the Circuit Court found that a "no strike" clause must be implied from a study of the entire collective bargaining agreement and the history of the negotiations between the parties. The Court then decided that the union strike arguably came within this implied no-strike clause, and the dispute should thus be submitted to arbitration. The *Northwest* case presents nothing new. As long ago as 1964, Judge Tuttle held a dispute to be minor when he found the carrier had raised "a substantial issue as to the interpretation of the contract. It is not a fictitious or merely colorable issue. Before a tribunal can decide that the terminations at issue were not justified, it must construe the language of Rule 16(e)." St. Louis, S.F. & T. Ry. v. Railroad Yardmasters of America, 328 F.2d 749 (5th Cir. 1964). We do not reject the basic proposition propounded by plaintiff. Rather, we feel plaintiff cannot come within its proposition.

With respect to all of the questioned runs, save two,[4] the court simply cannot accept plaintiffs contentions that the changes unilaerally proposed (and now unilaterally implemented) by the carrier are expressly or even arguably permitted under the agreement between the parties or under the RLA. Instead, the court concludes that a major dispute is involved, that the carrier had no authority under the Act to implement these changes without either mediation or agreement with the union, and that further implementation must be enjoined and the status quo restored. *Detroit & Toledo Shoreline R.R.* v. *United Transportation Union*, 396 U.S. 142 (1969).

It might be well at this point to capsulate plaintiff's contentions and to assign the reasons why the court believes they are untenable. Reduced to bare bones, the plaintiff's argument runs like this:

(1) Section 2, seventh, of the RLA (45 U.S.C. § 152, Seventh) permits a carrier to change rates of pay or working conditions, "as embodied in agreements" either as prescribed in 45 U.S.C. § 156 or "in the manner prescribed in such agreements . . . ";

(2) the changes which it proposes are either prescribed (embodied) in the existing agreement or at least are "arguably" so;

(3) if the changes are expressly authorized (embodied) in the existing agreement they are also authorized under the foregoing section of the RLA;

(4) if the changes are only "arguably" authorized or embodied in the existing agreement an interpreta-

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[4] These were entirely new runs, not existing runs which were to be restructured. As shown later, there may or may not be a difference.

tion becomes necessary to determine whether they are so authorized and embodied, and any question of interpretation of the contract is ipso facto classified by the Act as only a minor dispute (whatever it might otherwise be), and therefore compulsory arbitration under either section 3 of the Act, rather than mediation, is all that is required. RLA § 3(i), 45 U.S.C. § 153(i).

The court agrees with plaintiff that the existing agreement may at least "arguably" authorize compulsory arbitration where only *entirely new* over-the-road "runs" are proposed to be instituted; *but out of 17 runs in controversy only one falls in this category* while as to at least 16 others what is proposed by plaintiff is not the institution of a *new* run but a change in rates of pay and conditions of employment on an *existing* over-the-road run. With respect to these 16 proposed changes the court cannot agree that they are either "expressly" or even "arguably" authorized by or embodied in the existing agreement; and, being neither expressly nor arguably so authorized, these changes can only be made in accordance with 45 U.S.C. § 156. In short, as to them, a major dispute is involved and the court does not have to resort to a forbidden "interpretation" of the Act[5] to arrive at this conclusion. All it has to do is read and apply the plain and unambiguous language of Rule 8 of the agreement and the "Memorandum of Understanding" adopted in explanation thereof.[6]

Rule 8 of the existing labor agreement begins by saying that *"By agreement with the General Chairmen"* certain other rules may be suspended and special provisions estab-

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[5] *See* Aaxico Airlines, Inc. v. Airlines Pilots Ass'n. Int'l., 331 F.2d 433 (5th Cir. 1964).

[6] Though the court cannot interpret, the court can read the plain English in the contract. *See* discussion in *St. Louis S.F. & T. Ry., supra.*

lished governing hours of service and basis of pay on over-the-road runs. *But here there has been no "agreement with the General Chairmen"* as the rule requires. Instead, the company proposes to make the changes, and indeed has made them, unilaterally. Rule 8 itself clearly does not authorize or justify plaintiff's action in making the changes, either "arguably" or otherwise.

But plaintiff then relies on the "Memorandum of Understanding" as to the "Application of Rule 8" (p. 42 of the agreement) and after citing the provisions of the Memorandum authorizing submission of the issues to future compulsory arbitration in the event of failure to agree, it relies particularly on the next sentence (the last sentence of the second full paragraph of the Memorandum), which says:

> "The issues submitted [to future arbitration] . . . shall not include any question as to the *right* of the company to *establish* the run but shall be confined to the manner of implementing the run."

Plaintiff strenuously urges that this sentence applies to both the creation of entirely *new* runs (established to replace rail service) and to the restructuring of *existing* runs. In fact it says that both are the same—that a restructured existing run *is* a new run—and that pursuant to this sentence it can unilaterally restructure old runs, change rates of pay, change working conditions, relocate employees, and violate existing seniority districts at will, provided only that it arbitrate the changes later.

At the risk of indulging in a forbidden "interpretation" of the agreement the court could not accept this reading of what appears to be plain language in any event. As we read the Memorandum it plainly distinguishes between *new* runs and *existing* runs and treats each differently, separately, and in the disjunctive. By the express language of the Memorandum its first sentence relates only to existing runs and the balance of the Memorandum, including the

sentence relied on by plaintiff, relates only to the new. This sentence, therefore, cannot be applied to changes in an existing run.

But even if this be a forbidden judicial interpretation of the agreement (memorandum), and even if such interpretation is wrong, plaintiff nevertheless cannot prevail on its contention that the agreement (memorandum) authorizes what it has unilaterally done. This for four succinct reasons:

First: Conceding that under section 2, Seventh, of the RLA, *supra,* working conditions and rates of pay "as embodied in agreement" can be changed "in the manner prescribed in such agreements", the agreement (memorandum) here does not even mention working conditions or rates of pay and hence there *is* no agreement as to *how* they shall be changed. Certainly they cannot be so changed where the agreement is silent. *Detroit & Toledo Shoreline R.R.* v. *United Transportation Union,* 396 U.S. 142 (1969).[7] Finally, even read-

[7] This case is not like Rutland Railway Corp. v. Brotherhood of Locomotive Engineers, 307 F.2d 21 (2d Cir. 1962), *cert. denied* 372 U.S. 944 (1963), on which REA so heavily relied. In *Rutland,* the railroad unilaterally rescheduled train runs with a resultant loss of employment and displacement of personnel. Though there was no express provision in the collective bargaining agreement granting the railroads the right to unilaterally reschedule runs, the Court found that the past history of relations between the parties might have made the right to reschedule runs an implicit part of the managerial prerogative clause of the collective bargaining agreement. Here, the past history of the REA and BRAC conduct involving the restructuring of runs overwhelmingly supports the conclusion that REA has no such right to unilaterally reschedule runs, thus changing working conditions. The testimony is that in recent years between 600 and 700 runs have been restructured *after* negotiation and agreement between the parties. Thus the history of the parties' relations, like Rule 8, indicates that the provisions regarding basis of pay and other working conditions may be altered only by agreement, not by unilateral action.

ing the memorandum as plaintiff reads it, it nowhere says or suggests that under any circumstances the carrier can implement the run *before* the proposed arbitration, as was done in this case.

Second: If the agreement (memorandum) *did* mention working conditions and rates of pay, either expressly or impliedly (which it does not), and if it *did* provide for implementation first and arbitration later, it still would not suffice. It would be only an agreement to make an agreement in the future. This is presently no "agreement" at all. At least it is certainly not the kind of agreement contemplated in section 2, Seventh, of the Act. To hold otherwise would, as to major disputes, do away with the Act by substitution and postponement.

Third: If the agreement (memorandum) does propose what plaintiff contends (as set forth in the preceding paragraph) such provision would be void and unenforceable as contravening and reversing the order of procedure so carefully prescribed by Congress for major disputes, and as contravening the mandate of Congress, several times repeated, that existing working conditions and rates of pay shall be changed only after attempted section 7 arbitration, not before. In short, it would eliminate the requirements of the Act respecting maintenance of the status quo. *See Detroit & Toledo Shoreline R.R.* v. *United Transportation Union, supra.*

Fourth: If the agreement (Memorandum) means what plaintiff contends, and if such provision were allowed, it would also contravene the mandate of Congress by making arbitration of major disputes compulsory, whereas section 5, first, of the RLA specifically and purposely makes such arbitration voluntary (*see Detroit & Toledo R.R.* v. *United Transportation Union, supra*). Such change would therefore take negotia-

tions respecting changes in working conditions and pay out of the hands of the parties and turn them over to arbitrators, thereby allowing the arbitrators, in effect, to make a new contract between the parties.

In short, what plaintiff proposes is to do away with the procedures prescribed by the RLA by substitution. If such action were allowed the whole scheme of the Act would be set at naught and all the evils which it seeks to eliminate revisited upon the parties and the public. As the Supreme Court has said in a somewhat similar context:

> "The processes of bargaining and mediation called for by the Act would indeed become a sham if a carrier could unilaterally achieve what the Act requires be done by the other orderly procedures." *Brotherhood of Railway, Airline & Steamship Clerks* v. *Florida East Coast R.R.*, 384 U.S. 238, 247.

Accordingly, I respectfully dissent.

APPENDIX "B"

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. 15036

REA EXPRESS, INC.

v.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, an unincorporated association; PAUL J. MASSON, individually and as Field Representative of said Brotherhood; GULF DEPARTMENT, DISTRICT BOARD OF ADJUSTMENT, BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, an unincorporated association; W. A. JOHNSON, individually and as General Chairman of said Gulf Department; FULTON LODGE No. 2040, BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, an unincorporated association; respectively, and as representative of the craft or class consisting of all employees of REA Express, Inc. represented by BRAC

Order

REA Express, Inc. (REA) is an express carrier subject to the provisions of the Railway Labor Act, 45 U.S.C. §§ 151, *et seq.* (RLA). Its operating employees are represented by the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees (BRAC). For many years REA was owned by the American railroads and carried on its operations almost exclusively by rail, first by use of express baggage cars and later by a "piggy-back" hauling of loaded trucks. In re-

cent years due to the rapid discontinuance of rail passenger service and the delays incident to piggy-back freight service, it has operated more and more by truck routes over the highways. In 1967 or 1968 the railroads sold REA to private investors and during the ensuing months and years the new management concluded that in order to insure fast and efficient service to its customers, it would have to convert more and more to over-the-road truck operations.

In 1966, effective January 1, 1967, a contract was entered into between REA and BRAC governing hours of service and working conditions of REA's employees. Apparently recognizing that the mode of express deliveries was rapidly changing from rails to trucks, the agreement, at least to some extent, undertook to anticipate and provide for such transition. Thus, Rule 8 of the contract provided that:

> "By agreement with the General Chairmen in the Districts in which over-the-road truck runs are operated, the provisions of Rules 4, 5, 6 and 9[1] may be suspended and special provisions will be established governing hours of service, overtime, and basis of pay of over-the-road truck runs."

Also, apparently as part of the contract, the parties agreed to a "Memorandum of Understanding" as to the meaning of certain antecedent rules. With respect to the meaning of Rule 8, *supra,* the Memorandum of Understanding provides:

> "It is agreed and understood that under the application of Rule 8 existing over-the-road truck runs will continue to operate in accordance with Article IX of the September 1, 1949 Agreement. Arrangements concerning operation of new runs will be worked out by agreement between the General Chairmen and Company representatives except that: • • •

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[1] Rule 4 relates to hours of service, Rule 5 relates to overtime, Rule 6 relates to holidays and Rule 9 relates to basis of pay.

"In the event of failure to make an agreement concerning the operation of a new run within forty-five (45) days after notice is given to the General Chairman or General Chairmen representing the employes to be affected, the matter may be referred by either party to final and binding resolution in accordance with Sections 3 and/or 7 of the Railway Labor Act, as amended. The issues submitted for such determination shall not include any question as to the right of the Company to establish the run but shall be confined to the manner of implementing the run."

Since the 1966 agreement was made there has been a steady and increasing changeover from rail to truck service by REA. At first truck routes or "runs" were operated between terminal points almost exclusively on a "slip-seat" arrangement. That is, between terminal points such as Boston and Philadelphia a truck would leave each terminal in opposite directions, hauling express shipments to the other terminal. These two trucks would meet at an appointed destination approximately halfway between the two termini, exchange their loaded trailers, and each would return to its home terminal. Apparently at the suggestion of REA, the pay to a driver for each of these "runs" was arbitrarily fixed at a certain amount of money per round trip, this "trip pay" between the parties being separately negotiated with respect to each "run" involved. According to the evidence REA, at that time, preferred this means of compensation to an hourly or monthly rate, because it felt that its drivers would "hustle" if they got the same amount of money even though they completed their run in less than the expected time. Thus each driver was paid his full trip rate just as if he had worked a full eight hours on his "trip" although by "hustling" he might be able to complete his daily run in seven hours or less.

With the advent of new management it was determined that this method of over-the-road operation and pay involved many drawbacks and inefficiencies. If one driver

broke down or was unable to make the switching point on time, the other driver had to waste time awaiting his arrival. The time involved in switching operations was also lost, and REA found that, at least in some instances, the fixed "trip rate" agreed upon did not permit them to always get a full eight-hours' work for the equivalent of eight hours' pay.

Management therefore began renegotiating and restructuring the operation of these existing truck runs. This restructuring usually involved eliminating the "slip-seat" arrangement and instead provided that one through truck with driver should travel the entire distance between terminals. Such changes frequently involved overnight layovers for drivers, often involved changes in hours, and always involved changes in the basic trip pay. All these matters were adjusted for each trip on an ad hoc basis and by agreement. During the existence of the 1967 contract approximately 700 such changeovers in existing over-the-road operations have been made in this fashion. During the same period, not only were existing routes being thus restructured, but also, as piggy-back operations dwindled, entirely new over-the-road routes were being inaugurated, the terms being worked out by negotiation and agreement in the same way.

In the fall of 1970 REA proposed to BRAC and its district superintendents the implementation of one entirely new over-the-road run in the Northeastern United States and the restructuring of 16 other existing routes in the manner previously recited and in the same area. With respect to this proposal, however, the parties were unable to reach an agreement on rates of pay, etc., even after protracted negotiations, and on the 13th day of April, 1971, REA served notice that it intended to unilaterally institute its proposed changes without either agreement by the union or resort to the RLA. The union denied the carriers' right to unilaterally make these changes, contending that since they affected rates of pay and working conditions, a major

dispute was involved (within the meaning of the RLA) and that the changes could, therefore, be made only by agreement or by mediation. The union therefore served notices under § 6 of the RLA seeking to have what they conceived to be a major dispute mediated by the National Mediation Board as the Act provides. REA on the other hand denied that a major dispute was involved, and denied the jurisdiction of the Mediation Board and mediation proceedings were never completed. Finally, as the date for the implementation of the runs approached, the union on April 19, 1971 called a strike. Thereafter, on the evening of April 22, 1971 the carrier filed its complaint in this court seeking to enjoin the strike and the union filed a counterclaim seeking to enjoin implementation of the changes in the routes.

A temporary restraining order was entered, but with a provision that the court would accord the defendants a speedy hearing if desired. On Saturday, April 24, 1971, such a hearing was held on the application of the union and an order was entered (1) continuing the restraining order, (2) directing the parties to negotiate further with respect to an agreement about the 16 "runs" in question, and (3) allowing the carrier to proceed with its proposed implementation of the changes to be made pending further hearing on the question as to whether the dispute was major or minor in character. The order also carried a further admonition that if the carrier did carry out such implementation in the interim it would do so at its peril if it should later be determined that a major dispute was involved.

Thereafter, a full and complete evidentiary hearing was held on May 13, 1971 and the case is now ripe for decision as to (1) whether the temporary restraining order against the strike should continue as a temporary injunction or (2) whether the union, on its counterclaim, is entitled to an injunction against the implementation of the changes in the over-the-road runs plus a restoration of the status quo as it existed at the time negotiations broke off.

As in many of these cases, all parties concede that a determination of the single question whether the dispute here is a "major" dispute on the one hand or a "minor" dispute on the other will be largely determinative. A major dispute, of course, includes disputes over rates of pay, rules, working conditions to be included in new contracts, or changes to be made in existing contracts. The Railway Labor Act also provides (45 U.S.C. § 152 (Seventh)) with respect to major disputes, that "no carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in Section 156 of this title." Section 156 in turn provides that the provisions in the agreement regarding rates of pay, rules, and working conditions shall not be altered until the controversy has finally been acted upon by the Mediation Board.

Minor disputes on the other hand are those regarding the mere interpretation or application of existing collective bargaining agreements. Where a minor dispute is involved, compulsory arbitration before the National Railway Adjustment Board is required. For a general discussion of the difference between major and minor disputes, *see Elgin, Joliet & Eastern Ry.* v. *Burley,* 325 U.S. 711. *See also St. Louis, S. F. & T. Ry.* v. *Railroad Yardmasters of America,* 328 F.2d 749 (5th Cir. 1964), where Judge Tuttle discussed a minor dispute as one in which the respective contentions of the parties are based on existing agreements regarding rights that have already accrued.

The court finds, and indeed all parties virtually agree, that the changes which the carrier proposed to unilaterally implement in this case, standing alone, would clearly involve a major dispute [2] and that, nothing else appearing,

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[2] It is beyond question under the evidence that these changes directly altered rates of pay, working conditions, and seniority districts of the drivers involved.

the carrier could not put them into effect until there had been either an agreement with the union or the controversy had been finally acted on by the Mediation Board. 45 U.S.C. § 156, *supra*. Of course this court realizes that not every issue between the carrier and the union relating to "rates of pay, rules or working conditions" requires that § 6 be invoked. It must be invoked, however, where a unilateral change with respect to these matters, not provided for by contract, is proposed. *See St. Louis, S. F. & T. Ry., supra* at 753.

The plaintiff carrier, however, seeks to avoid the conclusion that a major dispute is involved on the ground that the changes it proposed were either expressly authorized, or at least arguably authorized, under the existing contract between the parties, and that the provisions of the agreement together with the last clause of § 2, Seventh, of the Railway Labor Act (45 U.S.C. § 152, Seventh), *supra*, permit it to unilaterally make the proposed changes irrespective of what kind of dispute might otherwise be involved. It also asserts that the dispute in any event can only be a minor one since it only involves an interpretation of the bargaining agreement.[3]

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[3] REA vigorously relies on the recent case of Northwest Airlines, Inc. v. Airline Pilots Ass'n., Intl., No. 20667, 8th Cir., Apr. 15, 1971 (slip opinion). As REA contends, this case does indicate that if a dispute between a carrier and a union arguably arises out of an interpretation of the collective bargaining agreement, the dispute should be submitted to arbitration. In *Northwest*, the Circuit Court found that a "no strike" clause must be implied from a study of the entire collective bargaining agreement and the history of the negotiations between the parties. The Court then decided that the union strike arguably came within this implied no-strike clause, and the dispute should thus be submitted to arbitration. The *Northwest* case presents nothing new As long ago as 1964, Judge Tuttle held a dispute to be minor when he found the carrier had raised "a substantial issue as to the interpretation of the contract. It is not a fictitious or merely colorable issue. Before a tribunal can decide that the terminations at

With respect to all of the questioned runs, save two,[4] the court simply cannot accept plaintiff's contentions that the changes unilaterally proposed (and now unilaterally implemented) by the carrier are expressly or even arguably permitted under the agreement between the parties or under the RLA. Instead, the court concludes that a major dispute is involved, that the carrier had no authority under the Act to implement these changes without either mediation or agreement with the union, and that further implementation must be enjoined and the status quo restored. *Detroit & Toledo Shoreline R.R.* v. *United Transportation Union,* 396 U.S. 142 (1969).

It might be well at this point to capsulate plaintiff's contentions and to assign the reasons why the court believes they are untenable. Reduced to bare bones, the plaintiff's argument runs like this:

(1) Section 2, seventh, of the RLA (45 U.S.C. § 152, Seventh) permits a carrier to change rates of pay or working conditions, "as embodied in agreements" either as prescribed in 45 U.S.C. § 156 or "in the manner prescribed in such agreements . . . ";

(2) the changes which it proposes are either prescribed (embodied) in the existing agreement or at least are "arguably" so;

(3) if the changes are expressly authorized (embodied) in the existing agreement they are also authorized under the foregoing section of the RLA;

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issue were not justified, it must construe the language of Rule 16(e)." St. Louis, S.F.&T.Ry. v. Railroad Yardmasters of America, 328 F.2d 749 (5th Cir. 1964). We do not reject the basic proposition propounded by plaintiff. Rather, we feel plaintiff cannot come within its proposition.

[4] These were entirely new runs, not existing runs which were to be restructured. As shown later, there may or may not be a difference.

(4) if the changes are only "arguably" authorized or embodied in the existing agreement an interpretation becomes necessary to determine whether they are so authorized and embodied, and any question of interpretation of the contract is ipso facto classified by the Act as only a minor dispute (whatever it might otherwise be), and therefore compulsory arbitration under either section 3 of the Act, rather than mediation, is all that is required. RLA § 3(i), 45 U.S.C. § 153(i).

The court agrees with plaintiff that the existing agreement may at least "arguably" authorize compulsory arbitration where only *entirely new* over-the-road "runs" are proposed to be instituted; *but out of 17 runs in controversy only one falls in this category* while as to at least 16 others what is proposed by plaintiff is not the institution of a *new* run but a change in rates of pay and conditions of employment on an *existing* over-the-road run. With respect to these 16 proposed changes the court cannot agree that they are either "expressly" or even "arguably" authorized by or embodied in the existing agreement; and, being neither expressly nor arguably so authorized, these changes can only be made in accordance with 45 U.S.C. § 156. In short, as to them, a major dispute is involved and the court does not have to resort to a forbidden "interpretation" of the Act[5] to arrive at this conclusion. All it has to do is read and apply the plain and unambiguous language of Rule 8 of the agreement and the "Memorandum of Understanding" adopted in explanation thereof.[6]

Rule 8 of the existing labor agreement begins by saying that *"By agreement with the General Chairmen"* certain

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[5] See Aaxico Airlines, Inc. v. Airlines Pilots Ass'n. Int'l., 331 F.2d 433 (5th Cir. 1964).

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other rules may be suspended and special provisions established governing hours of service and basis of pay on over-the-road runs. *But here there has been no "agreement with the General Chairmen"* as the rule requires. Instead, the company proposes to make the changes, and indeed has made them, unilaterally. Rule 8 itself clearly does not authorize or justify plaintiff's action in making the changes, either "arguably" or otherwise.

But plaintiff then relies on the "Memorandum of Understanding" as to the "Application of Rule 8" (p. 42 of the agreement) and after citing the provisions of the Memorandum authorizing submission of the issues to future compulsory arbitration in the event of failure to agree, it relies particularly on the next sentence (the last sentence of the second full paragraph of the Memorandum), which says:

> "The issues submitted [to future arbitration] . . . shall not include any question as to the *right* of the company to *establish* the run but shall be confined to the manner of implementing the run."

Plaintiff strenuously urges that this sentence applies to both the creation of entirely *new* runs (established to replace rail service) and to the restructuring of *existing* runs. In fact it says that both are the same—that a restructured existing run *is* a new run—and that pursuant to this sentence it can unilaterally restructure old runs, change rates of pay, change working conditions, relocate employees, and violate existing seniority districts at will, provided only that it arbitrate the changes later.

At the risk of indulging in a forbidden "interpretation" of the agreement the court could not accept this reading of what appears to be plain language in any event. As we read the Memorandum it plainly distinguishes between *new* runs and *existing* runs and treats each differently, separately, and in the disjunctive. By the express language of the Memorandum its first sentence relates only to existing runs and the balance of the Memorandum, including the

sentence relied on by plaintiff, relates only to the new. This sentence, therefore, cannot be applied to changes in an existing run.

But even if this be a forbidden judicial interpretation of the agreement (memorandum), and even if such interpretation is wrong, plaintiff nevertheless cannot prevail on its contention that the agreement (memorandum) authorizes what it has unilaterally done. This for four succinct reasons:

> *First:* Conceding that under section 2, Seventh, of the RLA, *supra,* working conditions and rates of pay "as embodied in agreements" can be changed "in the manner prescribed in such agreements", the agreement (memorandum) here does not even mention working conditions or rates of pay and hence there *is* no agreement as to *how* they shall be changed. Certainly they cannot be so changed where the agreement is silent. *Detroit & Toledo Shoreline R.R.* v. *United Transportation Union,* 396 U.S. 142 (1969).[7] Finally, even read-

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[7] This case is not like Rutland Railway Corp. v. Brotherhood of Locomotive Engineers, 307 F.2d 21 (2d Cir. 1962), *cert. denied* 372 U.S. 944 (1963), on which REA so heavily relies. In *Rutland,* the railroad unilaterally rescheduled train runs with a resultant loss of employment and displacement of personnel. Though there was no express provision in the collective bargaining agreement granting the railroads the right to unilaterally reschedule runs, the Court found that the past history of relations between the parties might have made the right to reschedule runs an implicit part of the managerial prerogative clause of the collective bargaining agreement. Here, the past history of the REA and BRAC conduct involving the restructuring of runs overwhelmingly supports the conclusion that REA has no such right to unilaterally reschedule runs, thus changing working conditions. The testimony is that in recent years between 600 and 700 runs have been restructured *after* negotiation and agreement between the parties. Thus the history of the parties' relations, like Rule 8, indicates that the provisions regarding basis of pay and other working conditions may be altered only by agreement, not by unilateral action.

ing the memorandum as plaintiff reads it, it nowhere says or suggests that under any circumstances the carrier can implement the run *before* the proposed arbitration as was done in this case.

Second: If the agreement (memorandum) *did* mention working conditions and rates of pay, either expressly or impliedly (which it does not), and if it *did* provide for implementation first and arbitration later, it still would not suffice. It would be only an agreement to make an agreement in the future. This is presently no "agreement" at all. At least it is certainly not the kind of agreement contemplated in section 2, Seventh, of the Act. To hold otherwise would, as to major disputes, do away with the Act by substitution and postponement.

Third: If the agreement (memorandum) does propose what plaintiff contends (as set forth in the preceding paragraph) such provision would be void and unenforceable as contravening and reversing the order of procedure so carefully prescribed by Congress for major disputes, and as contravening the mandate of Congress, several times repeated, that existing working conditions and rates of pay shall be changed only after attempted section 7 arbitration, not before. In short, it would eliminate the requirements of the Act respecting maintenance of the status quo. *See Detroit & Toledo Shoreline R.R.* v. *United Transportation Union, supra.*

Fourth: If the agreement (Memorandum) means what plaintiff contends, and if such provision were allowed, it would also contravene the mandate of Congress by making arbitration of major disputes compulsory, whereas section 5, first, of the RLA specifically and purposely makes such arbitration voluntary (*see Detroit & Toledo R.R.* v. *United Transportation Union, supra*). Such change would therefore take negotia-

> tions respecting changes in working conditions and pay out of the hands of the parties and turn them over to arbitrators, thereby allowing the arbitrators, in effect, to make a new contract between the parties.

In short, what plaintiff proposes is to do away with the procedures prescribed by the RLA by substitution. If such action were allowed the whole scheme of the Act would be set at naught and all the evils which it seeks to eliminate revisited upon the parties and the public. As the Supreme Court has said in a somewhat similar context:

> "The processes of bargaining and mediation called for by the Act would indeed become a sham if a carrier could unilaterally achieve what the Act requires be done by the other orderly procedures." *Brotherhood of Railway, Airline & Steamship Clerks* v. *Florida East Coast R.R.*, 384 U.S. 238, 247.

It is therefore ORDERED: (1) That the plaintiff be, and it is hereby, ENJOINED from implementing or instituting the changes proposed in its notice letter of April 13, 1971; and that (2) with respect to said proposed changes, plaintiff restore the status quo as it existed prior to April 19, 1971. (3) The defendant having already served notices of and requests for mediation pursuant to § 6 of the Railway Labor Act, it is ORDERED that it be, and it hereby it, likewise ENJOINED from continuing the strike called by it against plaintiff on April 19, 1971 until such time as the full procedures called for by the RLA have been complied with.

Though not called upon to do so, the court, after hearing the evidence in this case, expresses the opinion: (1) that, in the long run, the making of the changes proposed by the plaintiff here (as distinguished from the manner in which they were proposed and made) is probably in the best interest of both parties; and (2) that the defendant union probably has no serious objection to them per se, provided only that the manner of their implementation can be agreed

upon. In view of these opinions the court has ordered restoration of the status quo most reluctantly and only because it felt compelled to do so. The court therefore recommends to the parties that, if they agree with these conclusions, they proceed with all haste to attempt to reach an agreement. It has also occurred to the court that the conclusions reached in this order may be found to be wrong. If so, much damage may have accrued and many backward steps may have been taken. The court also believes that, pending an appeal, if any, the danger of irreparable injury to plaintiff is greater than to defendant. If the position of defendant is affirmed it can always exact restitution in the end. In view of these considerations, and in order to give the parties time to consider the suggestions made by the court, it is therefore ORDERED that execution of this order be stayed for a period of ten days or until a ruling on any appeal herein, should one be filed.

IT IS SO ORDERED.

This 17th day of May, 1971.

/s/ NEWELL EDENFIELD
Newell Edenfield
United States District Judge

FILED
JUL 28 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1627

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, GULF DEPARTMENT DISTRICT BOARD OF ADJUSTMENT OF BRAC, FULTON LODGE No. 2040, MESSRS. W. A. JOHNSON AND PAUL J. MASSON,

Petitioners,

—v.—

REA EXPRESS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT REA EXPRESS, INC. IN OPPOSITION TO CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1627

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, GULF DEPARTMENT DISTRICT BOARD OF ADJUSTMENT OF BRAC, FULTON LODGE NO. 2040, MESSRS. W. A. JOHNSON AND PAUL J. MASSON,

Petitioners,

—v.—

REA EXPRESS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT REA EXPRESS, INC. IN OPPOSITION TO CERTIORARI

Preliminary Statement

The opinions of the Courts below are included in Petitioners' Appendix A; references to the decisions are cited with the suffix "a". Petitioners are referred to herein as "BRAC", and Respondent as "REA".

Statutory Provisions

The Courts below found it unnecessary to consider REA's contentions that the injunctive relief sought by BRAC was barred by Sections 7 and 8 of the Norris-LaGuardia Act (29 U.S.C. §§107-108). Section 8 provides (29 U.S.C. §108):

> "No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration."

Like Section 8 of the Norris-LaGuardia Act, the Railway Labor Act also contains an "every reasonable effort" requirement (45 U.S.C. §152 First).

Question Presented

In addition to the questions presented by BRAC the following question will be argued on behalf of REA if, contrary to the position taken in this brief, certiorari should be granted:

> "Whether a status quo order should be granted when the party requesting it (a) has failed to seek equitable relief first, instead of striking, (b) has failed either to seek arbitration or to honor its commitment to arbitrate the dispute, (c) has failed to invoke the statutory grievance procedure, and (d) would be

harmed less by the denial of such an order than the other party would be injured by its grant, as found by both courts below."

Statement of the Case

This case arose out of a strike situation. The strike took place *during the term* of a collective bargaining agreement.* REA, the carrier, sought and obtained a preliminary injunction, halting the strike. BRAC, the union, sought and obtained a status quo order to restrain operation of the 17 over-the-road truck runs which precipitated the strike. The status quo order was the subject of appeal; no appeal was taken from the preliminary injunction.

The District Court granted the status quo order in the belief that the dispute was "major", in the parlance which has developed under the Railway Labor Act, but stayed such order pending appeal upon finding that "the danger of irreparable injury to [REA] is greater than to [BRAC]" (33a). The Court of Appeals reversed the status quo order, concluding that the dispute was "minor", and directed the District Court to grant REA's motion to compel arbitration of the dispute (11a).

Pursuant to Section 3 of the Railway Labor Act (45 U.S.C. §153) the parties have established a Special Board

* The relevant portion of the duration clause provides "No proposals for changes in rates of pay, hours of service or working conditions will be initiated by either party during the period of this Agreement, except that notices may be served on or after April 1, 1971, provided such notices do not contemplate effective dates earlier than July 1, 1971." (R. 323.) The dispute arose more than six months before July 1, 1971. As BRAC's petition points out, "the matter was the subject of substantial correspondence and several meetings between representatives of BRAC and REA" between November 18, 1970, and the date of the strike, April 19, 1971 (Pet. 8).

of Adjustment by agreement. The agreement states that the Adjustment Board "shall have jurisdiction of, and shall hear and decide, claims and grievances (including discipline cases) arising out of the interpretation or application of agreements governing rates of pay, rules, or working conditions between the parties signatory hereto and which are submitted to the Board" (R. 310, Exh. C).

The agreement also acknowledges

> "... the right of management to determine methods of operations and the utilization of the working forces...";

and

> "... the right of the parties to be free from all work stoppages, slowdowns, lockouts or other interruptions of work during the term of this Agreement" (R. 310, Exh. C).

Omitted from BRAC's statement of facts but significant to REA's view of the case are the facts involving REA's repeated efforts to secure, and BRAC's to avoid, arbitration. On February 10, 1971, REA initiated arbitration under Section 7 of the Railway Labor Act, in accordance with the following contractual provision (2a-3a):

> "In the event of failure to make an agreement concerning the operation of a new run within forty-five (45) days after notice is given to the General Chairman or General Chairmen representing the employees to be affected, *the matter may be referred by either party to final and binding resolution in accordance with Sections 3 and/or 7 of the Railway Labor Act, as amended.* The issues submitted for such determination

shall not include any question as to the right of the Company to establish the run but shall be confined to the manner of implementing the run." (Emphasis added.)

For the purpose of complying with the above clause, REA named its arbitrator, and requested that BRAC do the same (R. 341). On March 5, after BRAC's representative cancelled a meeting previously scheduled to discuss the subject, REA sent another letter pointing out the need for BRAC to name an arbitrator (R. 343). To date, BRAC still has not done so.

On April 30, 1971, REA made a separate submission of the dispute to the Special Board of Adjustment established pursuant to Section 3 of the Act (R. 20, Pl. Exh. 36), the other alternative specified under the arbitration clause quoted above. This submission was made after it had become apparent that the parties were in disagreement about whether truck runs involved in the dispute were "new".

BRAC's statement of facts misleadingly suggests that its Section 6 notice was the product of this dispute (Pet. p. 8). Instead, the notice was a general reopener of the contract between REA and BRAC, proposing many changes in virtually every part of the contract (R. 505, Def. Exh. 26). As the District Court found, the dispute about the truck runs arose in the "fall of 1970" (23a); BRAC's Section 6 notice was not served until April 1, 1971, and could not have affected rights under the duration clause of the collective bargaining agreement prior to July 1, 1971.*

* The duration clause is quoted *supra* at p. 4.

The Section 6 notice was served months after the dispute arose, and could not have become effective until substantially after the strike—in fact, the notice itself specified July 1, 1971 as the effective date (R. 308a).

Totally lacking is any record support for the statements in the petition that REA refused to negotiate (Pet. pp. 8, 9, 19). REA attempted to negotiate as well as arbitrate its differences with BRAC. BRAC refused, preferring instead to take advantage of REA's financial weakness by conducting a strike. The District Court specifically found that there had been "protracted negotiations" (23a). Further, before entering its order the District Court directed the parties to make additional efforts to seek a negotiated settlement (R. 464):

> "During the ten-day period immediately following Tuesday, April 27 (beginning Wednesday, April 28), the parties shall meet and shall negotiate in an effort to resolve their differences, including assignment of drivers, rates of pay and working conditions respecting the other 15 runs.
>
> Should these successive negotiations be successful, it should bring this controversy to an end. Should these successive negotiations not be successful, the Court will promptly proceed to a determination as to the nature of the disputes involved (whether major or minor) and direct such further proceedings under the Railway Labor Act as may be appropriate in the light of such decision."

BRAC's petition contends that the decision of the Court of Appeals is based on findings which it "gratuitously" made with respect to Rule 12 of the collective bar-

gaining agreement (Petition 11, 21). By a sinuous, garbled factual statement, which certainly does not comport with the requirements of Rule 23(4),* Petitioners suggest that the Court of Appeals was not fully informed about Rule 12, making its decision "without a shred of evidence before it on that issue" (Petition 21-22). The fact is that, following oral argument, the Court requested supplemental briefs dealing in detail with the position of the parties as to the applicability of Rule 12. A true copy of the Court's request is annexed hereto as Appendix A. REA's supplemental brief was twenty pages long (not including lengthy appendices), and BRAC's was fourteen pages. Thus it cannot be seriously contended that the Court of Appeals was not fully briefed on the subject.

ARGUMENT

I.

Certiorari should not be granted to review a hypothetical case.

BRAC's petition is devoted to an argument based upon the assumption that the collective bargaining agreement and the rights of the parties thereunder are only tangentially if at all involved in this litigation. However, BRAC's representative admitted that the dispute at heart

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* Rule 23(4) states that:

"The failure of a petitioner to present with *accuracy*, brevity, *and clearness* whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition." (Emphasis added.)

See *Furness, Withy & Company, Limited* v. *Yang-Tsze Insurance Ass'n Limited, et al.*, 242 U.S. 430 at 434 (1917).

was a contractual one in his first letter on the subject. The letter of the International Vice President, Mr. Devlin, dated February 23, 1971, written in response to REA's plan for the new runs, states:

> "Your proposals *are in violation of the Agreement.* I do not intend to document each and every violation in this letter because *the respective General Chairmen will file appropriate claims if this is necessary,* however, I should like to call to your attention a few facts that I hope will preclude the necessity of filing such claims." (R. 495, Exh. 18; emphasis added.)*

Later, of course, the BRAC served a Section 6 notice and attempted to frame the dispute in statutory terms. But the post hoc ergo propter hoc rationalizations of BRAC's lawyers can not convert the essence of the dispute into something which it is not.

> "In reaching for resolution of this problem of course we must not place undue emphasis on the contentions or the maneuvers of the parties . . . Since a Section 6 notice is required by the statute in order to initiate a major dispute, the labor representatives are likely to serve such a notice in any dispute arising out of any ambiguous situation so as thereby to make the controversy appear more like a major dispute . . . Or they may seek to bring the particular conflict at issue within the bounds of an outstanding Section 6 notice that in

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* The "claims" referred to would be BRAC's way of initiating the grievance procedure and bringing the matter ultimately before the Adjustment Board in accordance with the requirements of Section 3 of the Railway Labor Act (45 U.S.C. §153). The union's subsequent failure to file such claims is an indication of BRAC's evident lack of confidence in their merits in the light of prior Adjustment Board rulings.

reality does not relate to that dispute." *Rutland Railway Corp.* v. *Brotherhood of Locomotive Engineers,* 307 F.2d 21 at 33 (2d Cir. 1962), *cert. denied,* 372 U.S. 954 (1963).

To paraphrase a recent comment by this Court,

> "The difficulty with [BRAC's] position is that we must look to its [original statement], not to the arguments of its counsel, for the underpinnings of its [position]." *Federal Trade Commission* v. *Sperry & Hutchinson Co.,* 405 U.S. 233 (1972).

When one looks at BRAC's own initial view of the dispute, it is seen as purely a contractual matter which falls clearly within the ambit of the prior decisions of this Court concerning what constitutes a "minor" dispute. See *Elgin, J. & E. R. Co.* v. *Burley,* 325 U.S. 711, 723-725 (1945), ("minor" disputes seek "to enforce contractual rights" (325 U.S. at 724)); *Union Pacific Co.* v. *Price,* 360 U.S. 601 at 609 (1959), ("minor" disputes arise "from the application of collective bargaining agreements to particular situations"); *Pennsylvania R. Co.* v. *Day,* 360 U.S. 548 at 550 (1959).

II.

The decision below raises no significant issues for review.

The decision below involves an issue that has been raised (and decided) many times before: was a "major" dispute or a "minor" dispute involved? There is no reason for the Supreme Court to decide the issue yet again.

Even if the meaning of the contract were "plain", in the eyes of the District Court, the Adjustment Board is not thereby deprived of jurisdiction. The Adjustment Board has exclusive jurisdiction over the *application,* as well as *interpretation* of collective bargaining agreements. Thus, it alone can provide the remedy for violation of the labor agreement. In *United Steelworkers* v. *American Manufacturing Co.,* 363 U.S. 564 (1960), the Supreme Court rejected the so-called "Cutler-Hammer" doctrine which had held there was nothing to arbitrate if the contract's meaning was plain, in favor of the "therapeutic values" of labor arbitration and the "common law of the shop" (363 U.S. 564 at 567-8). Similar rulings in favor of the values of arbitration were upheld in the other cases of the *Steelworkers* "Trilogy": *United Steelworkers* v. *Warrior & Gulf Navigation Co.,* 363 U.S. 574 (1960). If there were no dispute over the meaning of the terms of the agreement, the Adjustment Board nonetheless must provide the remedy for its violation. See *United Steelworkers* v. *Enterprise Wheel and Car Corp.,* 363 U.S. 593 (1960).

The obligatory nature of the statutory grievance/arbitration procedure in Railway Labor Act cases was recently

underscored by this Court in *Andrews* v. *Louisville & Nashville Railroad,* 40 U.S.L.W. 4511 (May 15, 1972).

A decision by the Adjustment Board is of particular importance in this case. What BRAC has asserted, in essence, is that REA acted in violation of seniority rights. Seniority rights in particular are the product of the collective bargaining agreement and lie within the province of the Adjustment Board. Seniority districts fall under the jurisdiction of different union officials (General Chairmen). Typically one General Chairman does not want to lose work from one of his seniority districts to another General Chairman's seniority district. Thus, the matter becomes a jurisdictional dispute involving intra-union rivalry. The legislative history of and decisions under the Railway Labor Act make it clear that jurisdictional disputes were one of the chief reasons for the establishment of the Adjustment Boards. Under *Transportation-Communication Employees Union* v. *Union Pacific Railroad Co.,* 385 U.S. 157 (1966), there can be no question that this is a "minor" dispute requiring an Adjustment Board decision.

Moreover, this Court has held that any question as to whether a dispute is major or minor is within the primary jurisdiction of the Adjustment Board. "The court should exercise [its] equitable discretion to give that agency [the Adjustment Board] the first opportunity to pass on the issue." *Order of Railway Conductors et al.* v. *Pitney et al.,* 326 U.S. 561 at 567 (1946).

The various Courts of Appeals decisions are consistent, not conflicting, with the decision below. *Rutland Railway Corp.* v. *Brotherhood of Locomotive Engineers,* 307 F.2d 21 (1962), *cert. denied,* 372 U.S. 954 (1963), held that the

scheduling of new runs, such as is involved in the instant case, involved a minor dispute because (307 F.2d at 36):

> "... the existing agreements involved here, reasonably interpreted, may recognize implicitly a right in the railroad unilaterally to make the changes which it bulletined on September 8, 1960 .... Whether the railroad does in fact have the rights it claims, or whether on further analysis it does not is for the Board to determine; on the *ultimate* resolution of this issue we express no opinion."

Detroit & Toledo Shore Line R. Co. v. *United Transportation Union,* 396 U.S. 142 (1969) does not render this principle any less clear. In *Shore Line,* the interpretation of specific provisions of a written document or the application of an arbitration clause was not in issue; the rights the railroad relied on were not "expressed in an agreement" (396 U.S. at 148).

III.

The Court of Appeals' rejection of the District Court's interpretation of the contract does not warrant review.

It is clear that a Court of Appeals may reverse a District Court's unwarranted interpretation of a contract. The action by the Court of Appeals in doing so is not circumscribed by the "clearly erroneous" standard set forth in Rule 52 of the Federal Rules of Civil Procedure. As Judge Learned Hand stated in *Eddy* v. *Prudence Bonds Corp.,* 165 F.2d 157 (2d Cir. 1947), *cert. denied,* 333 U.S. 845 (1948):

> "It is not necessary to analyze the mental process by which a court imposes legal consequences upon verbal utterances; possibly, it is proper to call the result a

> 'finding of fact.' It is enough here, that, whatever the right description, such a finding is assailable as an ordinary finding of fact is not; for appellate courts have untrammelled power to interpret written documents." (165 F.2d at 163)

See also *Republic Pictures Corp. et al.* v. *Rogers,* 213 F.2d 662 (9th Cir. 1954); *United States* v. *John McShain, Inc.,* 258 F.2d 422 (D.C. Cir. 1958), *cert. denied,* 358 U.S. 832; *Cordovan Associates, Inc.* v. *Dayton Rubber Co.,* 290 F.2d 858 (6th Cir. 1961); *University Hills, Inc.* v. *Patton,* 427 F.2d 1094 (6th Cir. 1970).

IV.

Certiorari would serve no useful purpose because there are independent grounds for sustaining the decision below.

An order requiring restoration of the status quo rests on equitable considerations, including clean hands. BRAC's continuous delay in arbitrating the dispute, together with its use of the "ultimate weapon" of a strike—a strike which was illegal on any theory of the case—instead of seeking equitable relief if it felt itself wronged—shows that it is without clean hands. In a similar case, a railroad was denied an anti-strike injunction because it had rejected an offer of voluntary arbitration and thus had lost "the right to have the aid of equity in a federal court." *Brotherhood of Railroad Trainmen et al.* v. *Toledo, Peoria and Western Railroad,* 321 U.S. 50 (1944). This decision was based on the "every reasonable effort" requirement of Section 8 of the Norris-LaGuardia Act, which is applicable to employers and unions alike. BRAC has shown by its behavior that it has not exerted "every reasonable effort"

to settle this dispute. It therefore has no right to a status quo injunction.

The "every reasonable effort" requirement also is contained in Section 2 First (45 U.S.C. §152), which this Court recently held to be " . . . central to the effective working of the Railway Labor Act." *Chicago and North Western Railway Company* v. *United Transportation Union,* 402 U.S. 570 (1971).

Even though BRAC *argues* that REA's action was illegal, BRAC's strike *unquestionably* was illegal. The law seldom excuses a resort to a clearly illegal act by one on the basis of the commission of an allegedly but not clearly illegal act of another, especially when, as found below, the injury from the latter is not irreparable. No civilized legal system could long endure the philosophy that two wrongs make a right, and claims of illegality about action taken under a collective bargaining agreement are to be tested in ways other than on the economic battlefield. This is particularly true of a case in which the strike not only injures the opposing party but also, because of the essential nature of the services it performs, affects society generally. The fact that the problem of strikes relating to essential services, including transportation strikes, has been deemed so serious as to warrant national attention in at least three State of the Union messages, from Presidents of both parties, is not without significance in connection with this Court's consideration of a petition of a union which decided to flex its muscles instead of seek the attention of the courts at the outset of the dispute.

Even if the dispute indeed were "major", the strike would have been illegal because the statutory procedures had not been completed. *Detroit & Toledo Shore Line Railroad*

Co. v. *United Transportation Union,* 396 U.S. 142 (1969). Cf. *Brotherhood of Locomotive Engineers et al.* v. *Baltimore & Ohio Railroad Co. et al.,* 372 U.S. 284 (1963).

Further, the parties had agreed to arbitrate major as well as minor disputes, as shown in the language quoted *supra* on p. 4. ("... the matter may be referred by either party to final and binding resolution in accordance with Sections 3 and/or 7 of the Railway Labor Act, as amended.") Sections 3 and 7 of the Railway Labor Act both deal with arbitration (45 U.S.C. §§153, 157). Section 3 establishes a system of compulsory arbitration for "minor" disputes or, in the language of the statute, those disputes involving "grievances or ... interpretation or application" of the present collective bargaining agreement. *Brotherhood* v. *Chicago River & I.R. Co.,* 353 U.S. 30 (1957). Section 7 establishes a system of voluntary arbitration for "major" disputes, or those involving the formation of a new collective bargaining agreement.

In their arbitration clause, REA and BRAC agreed to arbitrate *all* disputes involving "new runs". The use of the disjunctive "Sections 3 and/or 7 of the Railway Labor Act" indicates the parties had agreed to arbitrate whether the dispute be regarded as "major" or "minor".*

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* While this provision relates only to "new" runs, disputes involving existing or "old" runs clearly would fall under the normal "minor" dispute grievance arbitration provisions. See *Rutland Ry. supra.* This is the paradox embodied in the decision of the District Court. Central to its reasoning was the belief that at least part of the runs were not "new"; yet, if the runs were not "new" they had to be *old,* making the dispute *a fortiorari* "minor" (i.e., arbitrable) in nature. It is inconceivable that the parties to a collective bargaining contract would have agreed to arbitrate the greater but not the lesser departure from past practice, yet this logical fallacy underlies the District Court's decision.

V.

Certiorari should not be granted in an equity action where both courts below found the balance of injury favors the result reached.

The Court of Appeals stated (11a):

> "The District Court was careful to point out that a status quo order rescinding REA's unilateral implementation of the 17 proposed runs might cause far greater irreparable harm to REA than to BRAC. We agree." *

Under the "two court" rule, such findings are conclusive. *Graver Tank and Mfg. Co., Inc. et al.* v. *Linde Air Products*

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* The District Court's finding on the subject is as follows (32a-33a):

> "Though not called upon to do so, the court, after hearing the evidence in this case, expresses the opinion: (1) that, in the long run, the making of the changes proposed by the plaintiff here (as distinguished from the manner in which they were proposed and made) is probably in the best interest of both parties; and (2) that the defendant union probably has no serious objection to them per se, provided only that the manner of their implementation can be agreed upon. In view of these opinions the court has ordered restoration of the status quo most reluctantly and only because it felt compelled to do so. The court therefore recommends to the parties that, if they agree with these conclusions, they proceed with all haste to attempt to reach an agreement. It has also occurred to the court that the conclusions reached in this order may be found to be wrong. If so, much damage may have accrued and many backward steps may have been taken. The court also believes that, pending an appeal, if any, the danger of irreparable injury to plaintiff is greater than to defendant. If the position of defendant is affirmed it can always exact restitution in the end. In view of these considerations, and in order to give the parties time to consider the suggestions made by the court, it is therefore ORDERED that execution of this order be stayed for a period of ten days or until a ruling on any appeal herein, should one be filed."

Co., 336 U.S. 271 at 275 (1949), and cases cited therein; *Virginia Railway Co.* v. *System Federation No. 40*, 300 U.S. 515 at 542 (1937); *Texas, New Orleans R. Co. et al.* v. *Brotherhood of Railway Clerks*, 281 U.S. 548 at 558 (1930).

In such circumstances, with the balance of injury favoring the result already reached, it seems highly questionable, to say the least, whether this case is of the importance which warrants consideration by the Supreme Court.

CONCLUSION

Certiorari should be denied and the petition dismissed.

Respectfully submitted,

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Certificate of Service

I hereby certify the foregoing Brief in Opposition to Certiorari was served by causing two true copies thereof to be airmailed, postage prepaid, to each counsel of record at his post office address this 28th day of July, 1972: Highsaw & Mahoney, Suite 506, 1015 Eighteenth Street, N.W., Washington, D.C. 20036 and William J. Donlon, General Counsel, Brotherhood of Railway and Airline Clerks, 6300 River Road, Rosemont, Illinois.

Arthur M. Wisehart

APPENDIX

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

OFFICE OF THE CLERK

January 14, 1972

To ALL COUNSEL OF RECORD

Re: No. 71-2212—REA Express, Inc. v. Brotherhood of Railway, Airline and Steamship Clerks, etc., et al.

Dear Sirs:

The Court requests that each party furnish a supplemental brief responding to the following inquiries:

1. Appellee has argued that even assuming all 17 of the over-the-road runs here at issue are "new runs" within the meaning of Rule 8 and its accompanying Memorandum of Understanding, changes in seniority rights are not within the scope of that rule and that, therefore, such changes in seniority rights must be considered as major disputes. Are the changes in seniority rights which have resulted from REA's unilateral implementation of the 17 over-the-road runs governed by Rule 12(b) through (e)? Additionally, are these changes the result of transfers of positions of work from one seniority district to another such that the procedures outlined in Rule 12(a) are applicable?

2. Assuming that the controversy over implementation of the 17 over-the-road runs substantially involves minor disputes which are properly the subject of arbitration

under RLA § 3 and/or § 7 and at the same time involves major disputes which are properly the subject of mediation under RLA § 6, should this Court denominate the entire controversy as "minor" or should it characterize the entire controversy as "major"?

Each party must file four (4) legible copies of the requested supplemental brief, either typewritten or printed, by January 28, 1972.

Yours very truly,

/s/ EDWARD W. WADSWORTH
Edward W. Wadsworth
Clerk

cc: Honorable Griffin B. Bell
Honorable Robert A. Ainsworth, Jr.
Honorable John C. Godbold